SUPREME COURT, U. S.

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No. 220

# In the Supreme Court of the United States

OCTOBER TERM, 1968

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**IRVING SHAPIRO,**

*Petitioner,*

**vs.**

**LEE T. SHAPIRO,**

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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# INDEX


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Question Presented | 2 |
| Constitutional Provisions, Statutes and Rules Involved | 3 |
| Statement | 4 |
| Reasons for Granting the Writ | 12 |
| Conclusion | 18 |


## CITATIONS OF AUTHORITY

*Cases*


| | |
|---|---|
| Airline Stewards and Stewardesses Ass'n v. Quinn, 35 Ill.2d 106, 219 N.E.2d 499 | 12 |
| Allen v. Georgia, 166 U.S. 138 | 13 |
| Bozarth v. Bozarth, 399 Ill. 259, 77 N.E.2d 658 | 6 |
| Burns v. Burns, 35 Ill.App.2d 34, 181 N.E.2d 605 | 16, 18 |
| Burns v. Ohio, 360 U.S. 252 | 14 |
| Douglas v. California, 372 U.S. 353 | 14 |
| Eisler v. United States, 338 U.S. 189 | 13 |
| Griffin v. Illinois, 351 U.S. 12 | 14 |
| Hovey v. Elliott, 167 U.S. 409 | 14 |
| National Union of Marine Cooks and Stewards v. Arnold, et al., 348 U.S. 37 | 12, 13, 14, 15, 16, 17 |

PAGE

*Constitutional Provisions*

Fourteenth Amendment to the Constitution of the United States ..... 3, 11, 12, 13, 18

Article VI, Section 7 Constitution of the State of Illinois ..... 3, 11, 12

*Statutes and Rules*

Ill.Rev.Stat., 1965, Ch. 110, §101.36 ..... 5

Ill.Rev.Stat., 1965, Ch. 110, §101.41(2) ..... 3, 15

Ill.Rev.Stat., 1967, Ch. 110A, §301 ..... 6

Ill.Rev.Stat., 1967, Ch. 110A, §303 ..... 5

Ill.Rev.Stat., 1967, Ch. 110A, §317 ..... 11

Ill.Rev.Stat., 1967, Ch. 110A, §325 ..... 6

Ill.Rev.Stat., 1967, Ch. 110A, §342 ..... 7

Ill.Rev.Stat., 1967, Ch. 110A, §343 ..... 3, 4, 14, 15

Illinois Civil Practice Act, Sec. 76 (Laws 1965, p. 628, §1 ..... 5

*Miscellaneous*

Committee Comments, Illinois Supreme Court Rule 343, Smith Hurd Annotated Statutes, 1967, Ch. 110A, §343 ..... 15

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Petitioner, Irving Shapiro, prays that a writ of certiorari be issued to review the judgment of the Appellate Court of Illinois, First Judicial District, entered in this cause on November 13, 1967, and November 28, 1967.

## OPINIONS BELOW

No opinions were rendered by the courts below.

## JURISDICTION

The judgment of the Appellate Court (Appendix A, *infra*) was entered on November 13, 1967. A motion to vacate that judgment and for other relief was denied on November 28, 1967. (Appendix B, *infra*) A timely "Petition for Appeal As a Matter of Right, or, in the Alternative, for Leave to Appeal" was denied by the Illinois Supreme Court on March 27, 1968. (Appendix C, *infra*) A petition to reconsider that order was denied by the Illinois Supreme Court on May 15, 1968. (Appendix D, *infra*) The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

## QUESTION PRESENTED

Whether a state reviewing court may, consistent with the due process and equal protection clauses of the Fourteenth Amendment, deny appellate review in a civil case where Petitioner filed his 3,421 page record and fully perfected his appeal by timely action, and thereafter made timely requests, supported by affidavits, for extensions of time within which to file his brief and abstract of record, the last of which requests was denied and judgment of the reviewing court dismissing his appeal was entered; and where, within four days thereafter and twelve days from the date his brief and abstract were due, Petitioner filed a 366 page printed abstract of the record, a 100 page printed additional abstract of over 600 exhibits introduced in the trial proceedings and a 71 page printed brief, together with a motion to vacate the judgment and for leave to file his brief and abstract instanter, which motion was denied; and where the state constitution grants all persons an appeal as a matter of right and the timely filing of briefs and abstracts is not a jurisdictional requirement?

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "Section 1. * * * No state shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article VI, Section 7 of the Constitution of the State of Illinois provides in pertinent part:

> "In all cases, other than those appealable directly to the Supreme Court, appeals from final judgments of a Circuit Court lie as a matter of right to the Appellate Court * * * ".

Former Rule 41(2) of the Illinois Supreme Court (Ill. Rev. Stat., 1965, Ch. 110, §101.41(2)) provided in pertinent part:

> " * * * If in any cause, whether on appeal or writ of error, either the abstract or brief is not filed within the time proscribed, the appeal or writ of error will, on the call of the docket, be dismissed. * * * "

Present Rule 343 of the Illinois Supreme Court (Ill.Rev. Stat., 1967, Ch. 110A, §343), superseding former Rule 41(2), provides:

> (a) *Time.* The brief of the appellant in the reviewing court shall be filed, with proof of service, within 35 days from the filing of the record on appeal, except that in cases in which a reviewing court grants leave to appeal or allows an appeal as of right the appellant shall file his brief within 35 days from the order allowing the appeal. Within 35 days from the due date of the appellant's brief, the appellee shall file his brief in the reviewing court with proof of service. Within 14 days from the due date of the appellee's brief, the appellant may serve and file a reply brief. Any reply brief of an appellee or other party permitted by rule

341(h) shall be filed within 14 days from the due date of the appellant's reply brief. A party who allows his petition for leave to appeal or his answer to stand as his brief shall notify the other parties and the clerk of the reviewing court.

(b) *Extending or Shortening Time.* The reviewing court or a judge thereof, *sua sponte* or upon the motion of a party supported by an affidavit showing good cause, may extend or shorten the time of any party to file a brief.

## STATEMENT

Respondent, hereinafter sometimes referred to as "plaintiff", initiated proceedings in the Circuit Court of Cook County, Illinois, for separate maintenance from Petitioner on October 9, 1961. (R. 9)[1] Various orders awarding temporary support and attorneys' fees were entered in favor of plaintiff. In addition, a separate action for partition of real property owned by the parties as joint tenants, filed by plaintiff on June 22, 1962, was consolidated for trial with the suit for separate maintenance. (R. 232) This matter, however, was determined in a summary proceeding. (R. 312-314) The issues in the suit for separate maintenance (and in a counter-claim for divorce filed by defendant) were heard by a jury and a verdict rendered in favor of plaintiff on July 8, 1963. (R. 700) Thereafter, on September 22, 1966, a decree of separate maintenance was entered. (R. 899-908) On October 21, 1966, Petitioner filed his notice of appeal from portions of this decree, the temporary support orders and awards for

[1] "R." references are to the page of the record of proceedings in the Circuit Court of Cook County, Illinois, filed in the Appellate Court of Illinois, First Judicial District, as the "Record on Appeal" and certified by that court to this Court.

attorneys' fees which preceded the decree, and the decree of partition which had been entered in the consolidated case.[2] (R. 928) His praecipe for record was filed on the same date. (R. 930)

On November 22, 1966, at Petitioner's request, the time for filing the report of proceedings was extended from December 10, 1966, to and including December 13, 1966,[3] by each of the four trial judges who had heard a portion of the proceedings. (R. 949, 953, 957, 963) The four portions of the report of proceedings were approved on December 13, 1966. (R. 973-979) Ten days later Petitioner filed a "short record"[4] in the Appellate Court of Illinois,

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[2] A party to a civil action in Illinois had and still has thirty days from the entry of judgment or decree within which to file his notice of appeal. Illinois Civil Practice Act, Sec. 76 (Laws 1965, p. 628, §1); Ill.Rev.Stat., 1967, Ch. 110A § 303.

[3] Under Illinois law at the time, the report of proceedings (transcript of evidence) must have been approved by the trial judge and filed with the clerk of the trial court within 50 days after the filing of the notice of appeal. The trial judge was permitted to extend the time for filing the report of proceedings an additional 45 days. Ill.Rev.Stat., 1965, Ch. 110 § 101.36(1)(c).

[4] At the time, Petitioner was allowed ten days after filing the report of proceedings to file his record on appeal in the reviewing court. Ill.Rev.Stat., 1965, Ch. 110 § 101.36(2)(d). Provision was made, however, for the filing of a "short record" consisting of "enough of the record on appeal to show a final order, judgment or decree, notice of appeal filed in proper time, proof of service of a copy * * *, the praecipe for record and proof of service and any other parts of the record * * * necessary to the application made." Ill.Rev.Stat., 1965, Ch. 110, § 101.36(2)(b). The reviewing court was authorized to extend the time for filing the complete record. Ill.Rev.Stat., 1965, Ch. 110, § 101.36(2)(e).

First Judicial District, and his appeal was timely and formally docketed.[5]

At the same time, Petitioner moved the Appellate Court for the entry of an order extending the time for filing the complete record to and including January 22, 1967,[6] setting forth by affidavit of his attorney that the clerk of the Circuit Court had been unable to complete the compilation of the entire record within the time allotted because of the number and volume of pleadings, orders and exhibits. (App. E, *infra*, pp. App. 4-5)[7] This motion was allowed. Petitioner filed a certification that the record was completed for filing on January 19, 1967, thus perfecting his appeal.[8]

Thereafter, on February 9, 1967, a further decree providing for payment of alleged arrearages, awarding Respondent $10,000 for defrayal of attorneys' fees in con-

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[5] Although failure to docket an appeal on time might be considered cause for dismissal, only the filing of the notice of appeal is jurisdictional. *Bozarth* v. *Bozarth*, 399 Ill. 259, 77 N.E.2d 658; see also, Ill.Rev.Stat., 1967, Ch. 110A, § 301. There is no question here, however, that the appeal was docketed on time.

[6] See footnote 4, *supra*.

[7] "App. E" references are to the page of Appendix E in which Petitioner's motions in the Appellate Court, and affidavits in support thereof, have been reproduced in chronological order. These motions and the orders in response thereto have been certified to this Court as part of the record of the Appellate Court.

[8] Illinois law permits the filing of such a certificate rather than the record itself. Ill.Rev.Stat., 1967, Ch. 110A, § 325.

nection with the aforestated appeal, entering a rule to show cause to issue against Petitioner and setting a hearing to determine further attorneys' fees was entered by the Circuit Court of Cook County. (R. 1076B, F, H; 1090-1091) Petitioner filed a timely notice of appeal from these decrees (R. 1093) and, in due time, filed his record in the reviewing court. His motion to consolidate this appeal with his first appeal was granted.

Prior to the order consolidating appeals, and subsequent thereto, Petitioner filed timely motions for extensions of time within which to file his brief and abstract.[9] Each of these motions, except the last, was supported by an affidavit of counsel explaining the cause for the request[10] and

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[9] One practice under Illinois law requires an Appellant to file an Abstract of Record, which may be described as a summarization, or abstraction, of the original papers and orders comprising the "common law record" portion of the record on appeal, and a narration of the pertinent testimony recorded in the "report of proceedings" portion of the record on appeal. Ill.Rev.Stat., 1967, Ch. 110A, §342e.

[10] Petitioner made seven such motions. All were opposed by Respondent. His first, filed on February 17, 1967, was supported by an affidavit reciting that the appeal would be affected by supplementary hearings (see text, pp. 6-7, *supra*), that he was preparing an appeal from adverse rulings in those hearings, and that he would move to consolidate that appeal with the present appeal when it was perfected. (See text, p. 7, *supra*) The affidavit also recited that counsel was engaged in the preparation of two unrelated appeals, and, because of these engagements and the size of the record in the instant appeal, he was unable to complete the brief and abstract within the time allotted to do so. Finally, counsel swore that the application for additional time was not interposed for the purpose of delay. (App. E, *infra*, pp. App. 5-6)

Counsel's affidavit in support of his second motion recited the continued pendency of the related hearings (see text, p. 9, *infra*) and the near perfection of the appeal in that matter, the engagement

each, except that one, was granted, except that the time allowed was usually less than requested. The last order

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of counsel in a prior unrelated matter of length and complication before the Appellate Court, and the length of the record in the instant case, as well as the prospective length and complexity of the brief, as matters which had prevented him from completing the brief and abstract. Counsel again affirmed that the extension of time was not sought for the purpose of delay. (App. E, *infra,* pp. App. 7-8)

Counsel's affidavit in support of the third motion recited that he was engaged in the preparation of the brief and abstract for the now consolidated appeals, that the abstract was unusually voluminous because of the size of the record and required an unusual amount of time in its preparation, and that counsel had been engaged in preparation for an extensive hearing before the Interstate Commerce Commission in New York City previously set for the month of June 1967. Again, counsel swore that the extension of time was not sought for purposes of delay. (App. E, *infra,* pp. App. 10-11)

Counsel affirmed, in support of the fourth motion, that the abstract had been prepared in draft form, that it was being typed and proofread in preparation for submission to the printer, that he was commencing the preparation of the brief which promised to be lengthy and complicated, and that other professional matters had prevented him from devoting full time to this matter. As before, counsel affirmed that the additional time was not sought for delay. (App. E, *infra,* pp. App. 12-13)

Counsel's affidavit in support of his September 29, 1967, motion recited that he had been engaged in the preparation of the brief and abstract but the intervention of two unrelated appeals and a two-week trial in the United States District Court for the Northern District of Illinois had prevented him from completing them. Again, the motion was not interposed for delay. (App. E, *infra,* pp. App. 13-14)

Counsel's affidavit in support of his sixth motion, made on October 24, 1967, recited that the abstract was being typed for submission to the printer, that the brief was being prepared and that his entire office staff was engaged in these tasks. Again, he affirmed that the extension of time was not sought for delay. On October 31, the Appellate Court allowed until November 5th to file the brief and abstract. (App. E, *infra,* pp. App. 15-16)

extended Petitioner's time for filing his brief and abstract to and including November 5, 1967.

On November 3, 1967, Petitioner requested an extension of time to and including November 30, 1967, within which to file his brief and abstract. This motion was supported by the affidavit of an agent of the U. S. Law Printing Company affirming that Petitioner's abstract had been submitted for printing, but stating that, because of the size of the abstract and other commitments, the printing could not be completed in time. (App. E, *infra*, p. App. 17) On November 13, 1967, Petitioner's motion was denied and his appeals dismissed without opinion. (App. A, *infra*, p. App. 1)

Four days later, on November 17, 1967, Petitioner lodged his abstracts and brief with the clerk of the Appellate Court, moved to vacate the order dismissing the appeal, requested leave to file the brief and abstracts instanter, and supported said motions by the affidavit of counsel explaining the cause of the delay. (App. E, *infra*, pp. App. 18-19)

The printed abstract which Petitioner tendered was 366 pages in length. It contained an abstraction of the pleading filed and orders entered between October 9, 1961, the date upon which the suit for separate maintenance was initiated, and February 9, 1967, the date of the entry of the last order appealed from. It also contained an abstraction of certain germane pleadings filed and orders entered between March 7, 1967 and April 21, 1967. The remainder of this volume was devoted to a concise narration of the proceedings had in connection with the filing of the pleadings and the entry of the orders.

A second volume of the abstract, one hundred printed pages in length, contained a summarization of over six

hundred plaintiff's and defendant's exhibits essential to a determination of many of the points raised on appeal.[11] A vast number of these documents were checks and bank statements.

Petitioner's Brief and Argument consisted of a two-page statement of the nature of the case and the issues raised on appeal, a seven-page statement of points and authorities, a four-page statement of facts, a fifty-six-page argument covering nine separate issues of law, and a two-page conclusion and prayer for relief, seventy-one pages in all. Over forty authorities, including statutes, were cited in support of Petitioner's position. He challenged the entire spectrum of orders entered by the trial

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[11] Some idea of the importance of these exhibits and the magnitude of the task involved in abstracting and collating the exhibits can be gained from an examination of Point VI of Appellant's (Petitioner's) Brief and Argument. Under the caption "The Court erred in finding that the defendant had an income of $20,000.00 to $22,000.00 per year when the undisputed evidence received by the court revealed that the defendant's income from 1953 to 1961 averaged per year net approximately $15,419.00 and that for the period 1961 to 1964 averaged approximately $18,564.00 per year net," Petitioner analyzed a multitude of exhibits and from this analysis argued (A) that the trial court abused its discretion in awarding alimony amounting to almost 60% of the defendant's annual income and bearing no reasonable relationship to the status in life which the parties maintained during the marriage; (B) that the error was compounded by the failure of the court to consider the income, business interests and separate estate of the plaintiff; and (C) that the trial court erred in refusing to admit certain defense exhibits which evidenced plaintiff's income, assets and business interests. In making this analysis and argument, Petitioner constructed a four-page "breakdown" of checks written by the parties during the period January 1959 through July 1961 (the month the parties separated). Petitioner also provided a summary of the checks written by the parties during this period which showed the month-by-month living expenses incurred by the parties.

court which adjudicated the property rights and financial obligations of the parties, including various awards totaling $19,000 to the attorneys for the plaintiff as and for temporary attorneys' fees, attorneys' fees in connection with the partition suit brought by the plaintiff (consolidated with the suit for separate maintenance, but summarily disposed of in an independent proceeding, without hearing, despite the verified answer raising issues of fact filed by Petitioner), and attorneys' fees in connection with her defense of the appeal, but exclusive of permanent fees for the prosecution of the suit below. Two of the arguments raised by Petitioner were based on orders entered by the trial court subsequent to the docketing of the first appeal and were encompassed with the second consolidated appeal.

The Appellate Court denied these motions, also without opinion. (App. B, *infra*, p. App. 1)

Thereafter, Petitioner petitioned the Illinois Supreme Court for appeal as a matter of right, or, in the alternative, for leave to appeal from the orders of the Appellate Court.[12] On March 27, 1968, without opinion, the Illinois Supreme Court denied leave to appeal. (App. C, *infra*, p. App. 2) Petitioner's subsequent petition to reconsider that order was denied on May 15, 1968, again without opinion. (App. C, *infra*, p. App. 3)

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[12] Rule 317 of the Rules of the Supreme Court of Illinois (Ill.Rev.Stat., 1967, Ch. 110A, § 317) permits a party to seek review of a decision of the Appellate Court as a matter of right "in cases in which a question under the constitution of the United States or of this state arises for the first time in and as a result of the action of the Appellate Court." The same rule permits an alternative prayer for leave to appeal. Petitioner claimed, in the Illinois Supreme Court, that the dismissal order violated his constitutional rights to due process and equal protection and, under Article VI, Section 7 of the Illinois Constitution, to appeal.

## REASONS FOR GRANTING THE WRIT

Article VI, Section 7 of the Illinois Constitution provides:

> "In all cases, other than those appealable directly to the Supreme Court, appeals from final judgments of a Circuit Court lie as a matter of right to the Appellate Court * * * *"

Thus, in Illinois, a party to a civil action has a constitutional right of appeal.[13] *Airline Stewards and Stewardesses Ass'n* v. *Quinn,* 35 Ill.2d 106, 219 N.E.2d 499. Arbitrary or capricious action denying this right not only violates the Illinois Constitution (*Airline Stewards and Stewardesses Ass'n* v. *Quinn,* 35 Ill.2d 106, 219 N.E.2d 499, 500), but denies due process and equal protection as well.

A similar question, although raised in a significantly different context, has previously been before the Court. *National Union of Marine Cooks and Stewards* v. *Arnold, et al.,* 348 U.S. 37. In considering "whether a state appellate court violates either the Due Process or the Equal Protection Clause of the Fourteenth Amendment * * *

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[13] Although the Supreme Court of Illinois has previously held that dismissing an appeal confers jurisdiction as a matter of right in that Court to determine the propriety of the dismissal, "for if the appellate court's dismissal was improper, [appellant has] been denied [his] constitutional right of appeal * * * as the order of dismissal precludes review of the trial court action," (*Airline Stewards and Stewardesses Ass'n* v. *Quinn,* 35 Ill.2d 106, 219 N.E.2d 499, 500) that Court refused to consider the merits of the Appellate Court's action in the present case. As a consequence, there has been no opinion, decision or holding on this question.

when it dismisses an appeal from a money judgment as a reasonable measure for safeguarding the collectibility of that judgment" (348 U.S. at 38), the Court established the framework within which the present Petition is composed. First, the Court decided that a claimed violation of the equal protection clause would not lie where "no showing has been made that anyone comparably situated has been treated differently from petitioner." (348 U.S. at 41) Second, the Court held that the due process clause was not violated where the dismissal was reasonably directed at sustaining the effectiveness of the appealed judgment against the petitioner's attempt to frustrate it. (348 U.S. at 43-45) See also, *Eisler* v. *United States,* 338 U.S. 189; *Allen* v. *Georgia,* 166 U.S. 138.

Mr. Justice Black, joined by Mr. Justice Douglas, dissenting, felt on the other hand that, since the state had provided a system of appellate review,

> "* * * proceedings in its supreme court are merely the final step in the judicial process in trying cases and therefore cannot be conducted so as to deny that 'due process' which the Fourteenth Amendment requires. Cole v. State of Arkansas, 333 U.S. 196, 201-202, 68 S.Ct. 514, 517, 92 L.Ed. 644, and cases there cited. And [the state] also must abide by the Fourteenth Amendment's equal protection command in deciding who can and who cannot appeal. Cochran v. State of Kansas, 316 U.S. 255, 62 S.Ct. 1068, 86 L.Ed. 1453." (348 U.S. at 45-46)

The dissent viewed the dismissal order as "punishment" for the petitioner's disobedience of a court order, "an offense having no relation at all to the merits of the plaintiff's claim or to the petitioner's defense." (348 U.S. at 46-47) Because the appeal was a continuation of the defense which began in the trial court and "From the beginning, due process and equal protection have meant that every defendant must be permitted to defend himself

in any court where his antagonist can appear and prosecute" (348 U.S. at 47; see also, *Hovey* v. *Elliott,* 167 U.S. 409), and because that right belongs to "one who has violated the laws the same as one who has not" (348 U.S. at 47), the dissent criticized the dismissal as a violation of Fourteenth Amendment rights.

Without settling the issues here presented—except, of course, insofar as the dissent's view would clearly support Petitioner's claim—*National Union* set the pace for later decisions. Thus, when the Court learned that a transcript of evidence was critical to effective appellate review of criminal convictions in Illinois and that indigent defendants were being denied such review solely because they could not afford transcripts, it condemned Illinois practice as a deprivation of equal protection and instructed the state to implement its appellate procedures to make them equally and fairly available to all. *Griffin* v. *Illinois,* 351 U.S. 12. A similar attitude was taken toward state procedures which denied effective review because of the lack of counsel (*Douglas* v. *California,* 372 U.S. 353), or because of the lack of ability to prepay statutory docketing fees (*Burns* v. *Ohio,* 360 U.S. 252). There is no particular mystique which differentiates these later decisions merely because they were rendered in the course of criminal prosecutions. As both the majority and dissent in *National Union* pointed out, once providing for appeal, a state must provide it equally and fairly to all. *National Union of Marine Cooks and Stewards* v. *Arnold, et al.,* 348 U.S. 37, 43, 45.

As a consequence, the question here presented is whether a state court may, within these limits described by *National Union,* punish counsel's delay — specifically permitted by Rule (Ill.Rev.Stat., 1967, Ch. 110A, §343) — by denying

his client appellate review. The question is highlighted by the fact that here the delay did not evince a disregard for the rules of court, did not threaten the effectiveness of the judgment and was non-jurisdictional in nature.

In Illinois, the timely filing of briefs and abstracts is not a jurisdictional step in the process of appeal. Prior to the adoption of new Rules of the Supreme Court of Illinois, if a brief or abstract were not filed within the time prescribed, the appeal would be dismissed on the call of the docket. Ill.Rev.Stat., 1965, Ch.110, §101.41(2). New Supreme Court Rule 343 (Ill.Rev.Stat., 1967, Ch.110A, §343), dealing with the filing of briefs and abstracts, omitted that provision. The committee which drafted those rules noted in connection with this omission:

> "The provision in the former rule that if a brief or abstract was not filed within the time prescribed the appeal would be dismissed on the call of the docket was omitted as both too strict and unnecessary. The court has the inherent power to dismiss an appeal for any breach of its rules, although a less drastic remedy would normally suffice. In the rare instances in which a brief of an appellant is inexcusably not filed on time, the court can exercise this power without any provision in the rule specifically authorizing it to do so."

Whether this most drastic remedy should have been imposed in the present case, therefore, raises questions of due process and equal protection unlike those settled in *National Union*. There, it was decided that the petitioner had attempted to frustrate the effectiveness of the state court's judicial process by his actions. (348 U.S. at 43-45) It was also shown that this conduct did jeopardize the effectiveness of this judgment. (348 U.S. at 44) Here, not only did the failure to file Petitioner's brief and abstract on time not jeopardize the effectiveness of the orders

and decrees being appealed, but the circumstances demonstrate that the delay in filing was not inexcusable nor an attempt to frustrate the judicial process. Petitioner undertook a formidable task by his appeal. The record, which he was required to abstract consisted of several volumes and exceeded 3,400 pages, including both the pleadings and the report of proceedings. In addition, over 600 exhibits were essential to a proper determination of the points raised on appeal. Petitioner was diligent in filing his record on appeal, doing so three days before he was required. Thereafter, he duly requested extensions of time within which to file his brief and abstract, supported by the affidavit of his attorney setting forth concise, but valid reasons why the brief and abstract had not been completed. In each, counsel swore that the request was not interposed for the purpose of delay. The last request was occasioned by the inability of the printing company to complete the printing. There were no unexplained delays; the Appellate Court was not left wondering, as it is in so many other cases, as to the progression of the appeal, the reason for the delay, and indeed whether Petitioner had made arrangements for an appeal at all. It was, as the dissent in *National Union* pointed out (348 U.S. at 46), as though the dismissal were punishment for disobedience of the time regulations for filing rather than a means for safeguarding the judgment itself. This is made clear by the fact that, also unlike *National Union,* the appeal was summarily dismissed. See also, *Burns* v. *Burns,* 35 Ill. App. 2d 34, 181 N.E.2d 605.

When, four days after the order dismissing his appeal and twelve days after his brief and abstract were due, Petitioner sought leave to file these documents and vacate the dismissal, the Appellate Court was assured—if it had ever harbored any doubt—that Petitioner had been engaged in this formidable task as his counsel had sworn.

The court had the two abstracts and the brief before it. It could see from the size and complexity of these documents that more than a few days had gone into their preparation. And at this time counsel repeated that the delay in filing these documents had been due to the inability of the printing company to complete the printing involved by November 5th, the date on which the documents were due, and that the printing had been completed within twelve days only because the company had devoted all of its time and energies to the task. (App. E, *infra*, pp. App. 18-19.)

Whether a reviewing court may, under these circumstances, totally deprive a party in a civil action appellate review of asserted trial court errors is as important a question as whether a state may deny effective appeal on the basis of other arbitrary standards. The majority in *National Union* held that the equal protection claim could not be sustained because no showing had been made that petitioner had been treated differently from anyone comparably situated. (348 U.S. at 41) Although no such showing is made here, none could possibly be made.[14] The nature of the circumstances assertedly justifying the dismissal defy the making of any such showing. Extensions of time for filing briefs and abstracts are granted in Illinois. So also are reasonably prompt motions for leave to file these documents instanter after the time for filing

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[14] Statistics showing the average number of extensions of time for filing briefs and abstracts granted parties to an appeal, the average length of time between judgment and filing of briefs or the reasons why extensions are granted or denied are not available in Illinois. There is, in short, apart from a case by case analysis, no way to advise the Court whether the length of time or number of extensions sought in this case exceeded the norm, or whether the reasons advanced by counsel met any informal, "average" standard.

has expired. It is safe to say that the requests made by Petitioner here did not exceed those made by any other comparably situated appellant in Illinois. No modern decision in Illinois records the fate of any appellant who has suffered as drastic a penalty as Petitioner under similar circumstances. Compare, *Burns* v. *Burns,* 35 Ill. App. 2d 34, 181 N.E.2d 605.

That this matter is obscured somewhat by the failure of the Illinois courts to enunciate the basis for denying Petitioner's state constitutional right to appeal is clear. But the failure to take cognizance of this right also involved a failure to comment on his rights to due process and equal protection under the Fourteenth Amendment. As a consequence, it is important for this Court to consider whether the Fourteenth Amendment prohibits a state from denying appellate review as a remedy for a failure to file briefs and abstracts in time, where the delay is explained, does not jeopardize the effectiveness of the judgment being appealed, is promptly remedied, and is not jurisdictional, and where the penalty is not proportionate to the "offense" nor to a fixed standard of experience.

## CONCLUSION

For the above and foregoing reasons, Petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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*Attorney for Petitioner*

JASON E. BELLOWS
SHERMAN C. MAGIDSON
*On the Brief*

## APPENDIX A

Nos. 51903 — 52198

| | | |
|---|---|---|
| Lee T. Shapiro, Plaintiff-Counter Defendant Appellee | ) | |
| vs. | ) | Appeal From Cook Circuit |
| Irving Shapiro, Defendant-Counter Plaintiff Appellant | ) | |

The Court having considered the motion of Appellant to extend the time to and including November 30, 1967 in which to file his abstract and brief, as per affidavit filed herein, and the Court having also considered the objections of appellee to said motion, and being now fully advised in the premises, doth order that said motion be and the same is hereby denied.

Motion appellee to dismiss the consolidated appeals, as per affidavit filed herein, and being now fully advised in the premises, doth order that said motion be and the same is hereby allowed.

## APPENDIX B

Nos. 51903 — 52198

The Court having considered the motion of Appellant to vacate order entered on November 13th, 1967 dismissing the appeals, and the Court being fully advised in the premises, doth order that the said motion be and is hereby denied.

Motion Appellant for leave of Court to file his abstract and brief, as per affidavit, instanter denied.

## APPENDIX C

[In the Supreme Court of Illinois]

Be It Remembered, that, to-wit: on the 27th day of March 1968, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

No. 41141

| | | |
|---|---|---|
| Lee T. Shapiro, Respondent | ) | Petition for Leave to Appeal from Appellate Court, First District. 51903 — 52198 Cons. |
| vs. | ) | |
| Irving Shapiro, Petitioner | ) | |

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by him in this behalf expended, to be taxed, and that he have execution therefor.

I, Clell L. Woods, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 14th day of June, 1968.

Clell L. Woods, Clerk,
Supreme Court of the State of Illinois.

## APPENDIX D

Be It Remembered, that, to-wit: on the 15th day of May, A.D. 1968, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

| | | |
|---|---|---|
| Lee T. Shapiro, Respondent | ) | Petition for Leave to Appeal from Appellate Court, First District. 51903 — 52198 Cons. |
| No. 41141 vs. | ) | |
| Irving Shapiro, Petitioner | ) | |

And now, on this day, the Court having duly considered the motion by petitioner for reconsideration of order denying petition for leave to appeal, and being now fully advised of and concerning the premises;

It Is Hereby Ordered that the motion by petitioner for reconsideration of order denying petition for leave to appeal be, and the same is, denied.

I, Clell L. Woods, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of an order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 14th day of June, A.D. 1968.

Clell L. Woods, Clerk,
Supreme Court of the State of Illinois.

## APPENDIX E

In the Appellate Court of Illinois
First District

| | | |
|---|---|---|
| Lee T. Shapiro, Plaintiff, Counter Defendant Appellee | ) | No. 62 S 13500 (Partition) consolidated with 61 S 19203 (Separate Maintenance) |
| vs. | ) | |
| Irving Shapiro, Defendant, Counter Plaintiff Appellant | ) | |

MOTION [of December 23, 1966]

Now comes defendant-appellant, Irving Shapiro, by his attorney, Jerome Berkson, and moves this court for an order extending the time to and including January 22, 1967 for the defendant-appellant to file the entire record herein and for an order allowing the defendant-appellant to file a short record herein instanter.

/s/ *Jerome Berkson*
Jerome Berkson
Attorney for Defendant-Appellant

State of Illinois,
County of Cook—ss.

Jerome Berkson, being first duly sworn, on oath deposes and says that he is the attorney retained to prepare the brief in this cause.

That under the rules of this court the defendant-appellant's record is due to be filed on December 23, 1966. That because of the tremendous volume of pleadings, orders and exhibits contained in the record herein, the Clerk of the Circuit Court of Cook County Chancery Division, is unable to complete and prepare the entire record in this cause

within the ten day period alloted by rule of this court from December 13, 1966, the date upon which the transcripts herein were approved and certified, to December 23, 1966.

That by reason thereof, your affiant has directed the Clerk of the aforesaid court to prepare a short record in this cause and prays for leave to file the short record herein instanter and for an order extending the time for filing the complete record herein up to and including January 22, 1967.

That this motion is not interposed for the purpose of delay.

/s/ *Jerome Berkson*

Subscribed and sworn to before me
this 20th day of December, 1966.
Roslyn Simon
Notary Public

* * *

MOTION of February 17, 1967.

Now comes the defendant-appellant, Irving Shapiro, by his attorney, Jerome Berkson, and moves this court for an order extending the time to and including June 1, 1967 for the defendant-appellant to file his abstract and brief in this cause.

/s/ *Jerome Berkson*
Jerome Berkson
Attorney for Defendant-Appellant

State of Illinois,
County of Cook—ss.

AFFIDAVIT

Jerome Berkson, being first duly sworn on oath deposes and says that he is the attorney retained by defendant-appellant, to prosecute this Appeal and to prepare the abstract and brief in this cause.

That under the rules of this court, the defendant's abstract and brief is due to be filed on Monday, February 27, 1967. That in a subsequent proceeding in the trial court recently terminated, a subsequent Notice of Appeal is now being prepared by affiant and preparation being made for a second appeal in the same cause, which your affiant will later move to consolidate with this pending appeal. That in addition, your affiant is presently engaged in the prosecution of two other pending appeals in this court.

That because of the extensive amount of work involved in the other appeals now being prosecuted by affiant and by reason of the fact that the abstract in this cause consists of over several thousand pages of testimony and pleadings, it is impossible for your affiant to complete the work required within the time laid down by the rules of this court.

Wherefore your affiant prays for an order extending the time to and including June 1, 1967, for the defendant-appellant to file his abstract and brief in this cause.

That this motion is not interposed for the purpose of delay.

/s/ *Jerome Berkson*

Subscribed and sworn to before me
this 17th day of February, 1967.
Roslyn Simon
Notary Public

* * *

MOTION of April 10, 1967.

Now comes the defendant-appellant, Irving Shapiro, by his attorney, Jerome Berkson, and moves this court for an order extending the time to and including July 1, 1967, for

the defendant-appellant to file his abstract and brief in this cause.

/s/ *Jerome Berkson*
Jerome Berkson
Attorney for Defendant-Appellant

State of Illinois,
County of Cook—ss. No. 51903

AFFIDAVIT

Jerome Berkson, being first duly sworn on oath deposes and says that he is the attorney retained by defendant-appellant, to prosecute this Appeal and to prepare the abstract and brief in this cause known as #51903.

That under the rules of this court, the defendant's abstract and brief is due to be filed on Monday, April 10, 1967. That in addition to the instant appeal there is now pending in the trial court, a subsequent appeal related to the subject matter of this appeal and which is in the process of being perfected for presentation in this court.

That for the last several months, your affiant has been overwhelmingly engaged in the preparation of another appeal pending in this court, entitled Phillips vs. Phillips, docketed as Appeal #51655 consolidated with #51921. That the time for filing the abstract and brief in said appeal is set for April 14, 1967. That said appeal involves the abstracting of approximately 2000 pages of testimony and over 500 pages of pleadings.

That your affiant is preparing said appeal in abstract and brief form and the argument therein is complicated and lengthy. That by continuous application to the preparation of the Phillips appeal your affiant is now able to file his abstract and brief therein and will do so on or before April 14, 1967.

That upon the completion of the Phillips appeal, as aforesaid, your affiant will be able to devote his fullest attention to the preparation of the appeal herein which your affiant intends to prepare in abstract and brief form. That this appeal involves the matter of abstracting approximately 5,000 pages of testimony and pleadings and will require argument touching upon at least seven or eight various points of law.

That by reason of the mere physical task involved, your affiant will require a reasonable amount of time in order to complete the preparation of this appeal.

Wherefore your affiant prays for an order extending the time for the defendant-appellant to file his abstract and brief in this cause to and including July 1, 1967.

That this motion is not interposed for the purpose of delay.

/s/ Jerome Berkson

Subscribed and sworn to before me
this ..... day of April, 1967..
Roslyn Simon
Notary Public

* * *

MOTION of May 3, 1967.

Now comes the defendant-appellant, Irving Shapiro, by his attorney, Jerome Berkson, and moves this Court for an order consolidating this cause #52198 with cause #51903, and allowing the defendant-appellant, to file a consolidated Abstract and Brief in both causes.

/s/ *Jerome Berkson*
Jerome Berkson
Attorney for Defendant-Appellant

State of Illinois,
County of Cook—ss.

AFFIDAVIT.

Jerome Berkson, being first duly sworn on oath deposes and says that he is the attorney retained by the defendant-appellant to prosecute this appeal and to prepare the abstracts and briefs in this cause.

That defendant-appellant has heretofore prosecuted his appeal in this court which has been docketed as cause #51003. That one of the bases of the appeal therein, is from a certain decree entered in the trial court on September 22, 1966, and from portions thereof. That cause #52198 is an appeal from certain orders entered subsequent to the entry of the decree aforesaid, and relates to matters exclusively related to said decree such as an order of judgment upon said decree; the issuance of a rule to show cause pursuant to said decree and the allowance of attorneys fees and costs for the defense of the appeal from said decree herein brought by defendant-appellant.

That by reason thereof, your affiant suggests that cause #52198 be consolidated with cause #51903 so as to enable the defendant-appellant to prepare his abstract and brief so as to include all matters arising out of the same cause in a single abstract and brief. That the consolidation of these causes would facilitate and make a single comprehensive appeal.

Wherefore your affiant prays for an order consolidating cause #52198 with cause #51903 and allowing the defendant-appellant to file a single abstract and brief in both causes as consolidated.

That this motion is not interposed for the purpose of delay.

/s/ Jerome Berkson

Subscribed and sworn to before me
this 28th day of April 1967.
Roslyn Simon
Notary Public

* * *

MOTION of June 1, 1967.

Now comes the defendant-appellant, Irving Shapiro, by Jerome Berkson, his attorney, and moves this Court for an Order extending the time to and including September 1, 1967, for the defendant-appellant to file his abstract and brief in this cause.

/s/ *Jerome Berkson*
Jerome Berkson
Attorney for Defendant-Appellant

State of Illinois,
County of Cook—ss.

Nos. 51903 and 52198 Consolidated

AFFIDAVIT.

Jerome Berkson, being first duly sworn on oath deposes and says that he is the attorney retained by defendant-appellant, to prosecute this Appeal and to prepare the abstract and brief in this cause known as #51903 and #52198 Consolidated.

That under the rules of this court, the defendant's abstract and brief is due to be filed on Thursday, June 1, 1967.

That your affiant has, for sometime past, been working exclusively upon the preparation of the abstract and brief in this cause, which is voluminous and covers orders entered in the Trial Court covering a period of five (5) years,

going back to 1962. That your affiant has elected to prepare an abstract of the record herein rather than excerpts and that such abstract is extremely voluminous and requires an unusual number of hours in preparation.

That in addition, your affiant has long previously been engaged in extensive hearings before the Interstate Commerce Commission on behalf of a client and that hearings in the matter were previously set to commence on or about June 5, 1967, in New York City, to extend for a period of approximately two weeks, which will include consecutive hearing days and which have required your affiant to spend considerable time in preparation therefor, at the expense of time which he would otherwise be able to devote to the preparation of the abstract and brief herein.

Wherefore your affiant prays for an order extending the time for the defendant-appellant to file his abstract and brief in this cause to and including September 1, 1967.

That this motion is not interposed for the purpose of delay.

/s/ Jerome Berkson

Subscribed and sworn to before me
this ..... day of May, 1967.
Roslyn Simon
Notary Public

* * *

MOTION of July 20, 1967.

Now comes the defendant-appellant, Irving Shapiro, by Jerome Berkson, his attorney, and moves this Court for an Order extending the time to and including October 1, 1967, for the defendant-appellant to file his abstract and brief in this cause.

/s/ *Jerome Berkson*
Jerome Berkson
Attorney for Defendant-Appellant

State of Illinois,
County of Cook—ss.

Nos. 51903 and 52198 Consolidated

AFFIDAVIT.

Jerome Berkson, being first duly sworn on oath deposes and says that he is the attorney retained by defendant-appellant, to prosecute this Appeal and to prepare the abstract and brief in this cause known as #51903 and #52198 Consolidated.

That under the rules of this court, the defendant's abstract and brief is due to be filed on Thursday, July 20, 1967.

That your affiant has, for sometimes past, been working exclusively upon the preparation of the abstract and brief in this cause, which is voluminous and covers orders entered in the Trial Court covering a period of five (5) years, going back to 1962. That your affiant has elected to prepare an abstract of the record herein rather than excerpts and that such abstract is extremely voluminous and requires an unusual number of hours in preparation.

Your affiant has completed the manual abstracting of the record herein and same is now being typed for proof reading and submission to the printer. That work can now be commenced upon the preparation of the Brief and Argument which will also, by necessity, be highly complicated and involved, as well as lengthy. That in addition, your affiant, during this course of time, has been engaged in several contested proceedings at the trial court level, which have necessitated numerous hours of court time at the expense of office time which could have been used in further preparation of this Appeal.

Wherefore your affiant prays for an order extending the time for the defendant-appellant to file his abstract and brief in this cause to and including October 1, 1967.

That this motion is not interposed for the purpose of delay.

/s/ Jerome Berkson

Subscribed and sworn to before me
this ..... day of July, 1967.
Roslyn Simon
Notary Public

* * *

MOTION of September 29, 1967.

Now comes the defendant-appellant, Irving Shapiro, by Jerome Berkson, his attorney, and moves this Court for an Order extending the time to and including January 1, 1968, for the defendant-appellant to file his abstract and brief in this cause.

/s/ *Jerome Berkson*
Jerome Berkson
Attorney for Defendant-Appellant

State of Illinois,
County of Cook—ss.

Nos. 51903 and 52198 Consolidated

AFFIDAVIT.

Jerome Berkson, being first duly sworn on oath deposes and says that he is the attorney retained by defendant-appellant to prosecute this Appeal and to prepare the abstract and brief in this cause known as #51903 and #52198 Consolidated.

That under the rules of this court, the defendant's abstract and brief is due to be filed on October 1, 1967.

That your affiant has been diligently working upon the preparation of the abstract and brief in this cause which,

as he has heretofore indicated to this court, is voluminous, covering a period of five (5) years going back to 1962, and that your affiant is preparing an abstract of the record herein rather than excerpts for the benefit of this court.

That several appeals have intervened so that your affiant has been required to devote a reasonable amount of time to the perfection of those appeals such as, to-wit, Smith v. Smith, docketed as cause No. 52458 in the Second Division and Hokin vs. Hokin, #66 D 4103, now being perfected in the trial court.

In addition, your affiant was required to devote a period of almost two consecutive weeks to the trial of a matter heretofore set by the Interstate Commerce Commission in the Federal District Court for this District.

With reference to this application for an extension, it should be noted that no undue burden is imposed upon the appellee in that this appeal is from a decree of separate maintenance which is still the subject of proceedings in the trial court to enforce its provisions and which the appellant is still required to defend, notwithstanding the fact this appeal herein is taken from said decree.

Wherefore your affiant prays for an order extending the time for the defendant-appellant to file his abstract and brief in this cause to and including January 1st, 1968.

That this motion is not interposed for the purpose of delay.

/s/ Jerome Berkson

Subscribed and sworn to before me
this 26th day of September 1967.
Roslyn Simon
Notary Public

* * *

MOTION of October 24, 1967.

Now comes the defendant-appellant, Irving Shapiro, by Jerome Berkson, his attorney, and move this Court for an Order extending the time to and including December 1, 1967, for the defendant-appellant to file his abstract and brief in this cause.

/s/ *Jerome Berkson*
Attorney for Defendant-Appellant

State of Illinois,
County of Cook—ss.

Nos. 51903 and 52198 Consolidated

AFFIDAVIT.

Jerome Berkson, being first duly sworn on oath deposes and says that he is the attorney retained by defendant-appellant to prosecute this Appeal and to prepare the Abstract and Brief in this cause known as #51903 and #52198 consolidated.

That your affiant, on September 29, 1967, filed a motion in this court praying for an extension for the defendant to file his Abstract and Brief in this cause to January 1, 1968. On October 10, 1967, this court allowed said motion but limited the time for filing the Abstract and Brief in this cause to October 24, 1967.

That it is literally and physically impossible for your affiant to file his Abstract and Brief herein on October 24, 1967. That as has heretofore been stated, the record herein is voluminous, covering a period of five (5) years. That the testimony alone exceeds several thousand pages, the

record exceeds 500 pages, all of which your affiant is attempting to abstract in detail for the information of this court.

That over the last several months your affiant and his entire staff almost totally engaged in work on the abstract herein so that it is now in the process of being typed and prepared for the printer and will soon be available for submission to the printer.

In addition, your affiant is diligently working on the brief which, by very nature of the volume of the record herein and the number of items being appealed from, is, of itself, lengthy and complicated.

That your affiant has been most diligent in this matter and has been making a concentrated effort to complete this Appeal, and that he will devote his fullest time and effort to completion of this Appeal by December 1, 1967, if granted time to file his Abstract and Brief to said date.

Wherefore your affiant prays for an order extending the time for the defendant-appellant to file his abstract and brief in this cause to and including December 1, 1967.

That this motion is not interposed for the purpose of delay.

/s/ Jerome Berkson

Subscribed and sworn to before me
this ..... day of October, 1967.

Roslyn Simon
Notary Public

* * *

MOTION of November 3, 1967.

Now comes the defendant-appellant, Irving Shapiro, by his attorney, Jerome Berkson, and moves this court for an Order extending the time to and including November 30, 1967, for the defendant-appellant to file his abstract and brief in this cause in accordance with the affidavit of the United States Law Printing Company attached herewith.

/s/ *Jerome Berkson*
Jerome Berkson
Attorney for Defendant-Appellant

[Affidavit]

In Re: Lee T. Shapiro
vs.
Irving Shapiro
51903 and 52198 Consolidated

State of Illinois,
County of Cook—ss.

A. J. Petrando, being first duly sworn, on oath deposes and says that he is the duly authorized agent of United States Law Printing Company; that United States Law Printing Company has been engaged by Jerome Berkson, attorney, to prepare the printed abstract in the above captioned appeal on behalf of Defendant-Appellant; that United States Law Printing Company has been working diligently in an effort to complete said work but because of the pressure of other prior commitments, and the size of this abstract, it has been unable and probably will be unable to complete said work prior to about November 30, 1967, and has so advised Jerome Berkson, as attorney for Defendant-Appellant.

/s/ A. J. Petrando

Subscribed and sworn to before me
this ..... day of November, 1967.

.....
Notary Public.

* * *

MOTION of November 17, 1967.

Now comes the defendant-appellant, Irving Shapiro, by Jerome Berkson, his attorney, and moves this Honorable Court for an order vacating the order heretofore entered herein on November 13, 1967, wherein the motion of the defendant-appellant to extend the time for filing abstract and brief herein to November 30, 1967, was denied, and wherein this appeal was dismissed.

That petitioner prays for leave to file his abstract and brief herein, instanter, same having been fully completed and printed in accordance with the rules of the Illinois Supreme Court.

/s/ *Jerome Berkson*
Jerome Berkson
Attorney for Defendant-Appellant

State of Illinois,
County of Cook—ss.

Nos. 51903 and 52198 Consolidated

AFFIDAVIT.

Jerome Berkson, being first duly sworn on oath deposes and says that he is the attorney retained by defendant-appellant to prosecute this Appeal and to prepare the Abstract and brief in this cause known as #51903 and #52198 consolidated.

That the time for the defendant-appellant to file his brief and abstract herein was heretofore set for November 5, 1967. That on November 3, 1967, your affiant filed herein, a motion to extend the time to file his abstract and brief in this cause to November 30, 1967, and attached to the aforesaid motion, the affidavit of A. J. Petrando, the

duly authorized agent of the United States Law Printing Company, requesting said extension to November 30, 1967.

That your affiant has heretofore completed the writing of the abstract and brief herein and had submitted same to the aforesaid printing company so that same could be printed and filed herein. That since the order entered by this court on November 13, 1967, dismissing this cause, your affiant has prevailed upon the printer to exert all of his energies so that he has been able to conclude the printing of the abstract and brief and same is now completed and ready to be filed herein, instanter.

That there is no unnecessary delay on the part of your affiant and that the said abstract and brief have been completed well in advance of the time previously requested for an extension. That the abstract herein consists of in excess of 400 pages and the abstract and brief have been printed at tremendous expense by defendant-appellant in order to make every effort to comply with the requirements of this court, and that in fairness and justice the defendant-appellant should be afforded the opportunity to file his abstract and brief herein, instanter.

Wherefore your affiant prays for an order vacating the order of dismissal of this appeal heretofore entered herein on November 13, 1967, and for leave to file the defendant-appellant's brief herein, instanter.

/s/ Jerome Berkson

Subscribed and sworn to before me
this 14th day of November, 1967.
Roslyn Simon
Notary Public

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Office-Supreme Court, U.S.
FILED
JUL 26 1968
JOHN F. DAVIS, CLERK

No. 220

In the
# Supreme Court of the United States

OCTOBER TERM, 1968.

IRVING SHAPIRO,

*Petitioner,*

*vs.*

LEE T. SHAPIRO,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

SAMUEL A. RINELLA
One North LaSalle Street
Chicago, Illinois 60602
Attorney for Respondent

The Scheffer Press, Inc.—ANdover 3-6850

# INDEX


PAGE

Statement ..... 1

Reasons for Denial of the Writ ..... 3

Conclusion ..... 6


## CITATIONS OF AUTHORITY

*Cases*


Airline Stewards and Stewardesses Ass'n v. Quinn, 35 Ill.2d 106, 219 N.E.2d 499 ..... 4

Allen v. Georgia, 166 U.S. 138 ..... 5

Bozarth v. Bozarth, 399 Ill. 259, 77 N.E.2d 658 ..... 4

Burns v. Ohio, 360 U.S. 252 ..... 4

District of Columbia v. Clawans, 300 U.S. 617 ..... 4

Douglas v. California, 372 U.S. 353 ..... 4

Eisler v. United States, 338 U.S. 189 ..... 5

Griffin v. Illinois, 351 U.S. 12 ..... 4

Hovey v. Elliott, 167 U.S. 409 ..... 5

In Re Curtis' Petition, 240 Fed. Sup. 475 ..... 4

McKane v. Durston, 153 U.S. 684 ..... 3

National Union of Marine Cooks and Stewards v. Arnold, et al., 348 U.S. 37 ..... 3, 4

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

---

## *No. 220*

---

IRVING SHAPIRO,

*Petitioner,*

*vs.*

LEE T. SHAPIRO,

*Respondent.*

---

**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT**

---

Lee T. Shapiro, respondent herein, files herewith her Brief in Opposition to the Petition of Irving Shapiro, petitioner, for the issuance of a Writ of Certiorari to review the judgments of the Appellate Court of Illinois, First Judicial District, entered in this cause on November 13, 1967, and November 28, 1967.

### STATEMENT

The causes herein involved had their inception in the filing on December 7, 1961, of the respondent's Complaint for Separate Maintenance, followed on June 22, 1962, by the filing of a Complaint by the respondent for the Par-

tition of real property. (R. 15, 166) The causes were consolidated. Thereafter the partition matter was disposed of by a summary decree for partition entered on July 27, 1962, (R. 312) by a decree of sale, entered on December 4, 1962, (R. 363) and by decree approving report of sale entered January 16, 1963, (R. 396-397). The question of separate maintenance was resolved by a Decree entered in favor of the respondent on September 22, 1966, more than five years subsequent to the filing of the suit (R. 899-908). These decrees comprise the subject matter of Appeal No. 51903 in the Appellate Court of Illinois, First District. Appeal 52918 was from an order entered December 30, 1966, requiring the payment by the petitioner to respondent of attorneys' fees and costs to defend the former appeal (R. 1076B).

## REASONS FOR DENIAL OF WRIT

We submit that a careful examination of the Petition in this cause fails to reveal the existence of any question proper for federal adjudication. The petitioner begins with the gratuitous assumption that he was denied a right of appeal, whereas the record distinctly shows:

(1) That he was afforded such right,
(2) That he availed himself of this right, and
(3) That he so temporized and delayed in the prosecution thereof that the matter eventuated in a dismissal of the appeal. (Petition, Appendix A), in a refusal to reconsider the dismissal (Petition, Appendix B), in the denial by the Supreme Court of Illinois for leave to appeal (Petition, Appendix C), and in the denial of a motion for reconsideration of that order (Petition, Appendix D).

It is conceded in the petition (page 17), that no showing is made or could be made that the petitioner has been treated differently from anyone comparably situated, a showing which is distinctly required under the holding in *National Union of Marine Cooks and Stewards* v. *Arnold et al.* (1954), 348 U.S. 37.

The petition further ignores the well recognized rule of law that right to an appeal has never been, and is not now, a necessary element of due process (*National Union of Marine Cooks and Stewards* v. *Arnold et al.*), (1954), 348 U.S. 37, 43, where the court said:

> "While a statutory review is important and must be exercised without discrimination, such a review is not a requirement of due process."

This followed a earlier holding in *District of Columbia* v. *Clawans* (1937), 300 U.S. 617, 627, and in *McKane* v. *Durston* (1894), 153 U.S. 684, 687. In the *McKane* case, one who

had been convicted of a crime punishable by fine and imprisonment in a state court applied for, and was denied, bail under a statute which provided absolutely therefor in cases punishable by a fine, and left it to the discretion of the court in cases involving imprisonment. This court said, at 153 U.S. pages 687 and 688:

> "If he applied for bail, and bail was denied, the action of the court was not the subject of review because the granting or refusing bail was made by the statute matter of discretion. . . . But, as already suggested, whether an appeal should be allowed, and if so, under what circumstances, are matters for each state to determine for itself."

The principle that an appeal is not a matter of due process has been lately followed in *In re Curtis' Petition* (1965), District Court, Eastern District of Missouri, Eastern Division 240 Fed. Supp. 475, 485.

The cases cited by the petitioner in support of his position are not applicable to the case at bar. *Airline Stewards and Stewardesses Association* v. *Quinn,* 35 Ill. (2nd) 106, 219 NE (2nd) 499, decides only that denial of leave to substitute a party, where that denial would have the effect of barring an appeal, was erroneous. *Bozarth* v. *Bozarth,* 399 Ill. 259, 77 N.E. (2nd) 658, 659, holds only that failure to file in apt time, pursuant to Illinois appellate procedure, the praecipe and transcript of record does not affect the jurisdiction of the court; and, although the court elected to decide the case on the merits, it clearly stated that failure to follow procedural rules might be grounds for the dismissal of an appeal, thereby further vitiating the present petitioner's position under the rule set out in *National Union of Marine Cooks & Stewards* v. *Arnold et al.,* (1954) 348 U.S. 37. *Burns* v. *Ohio,* 360 U.S. 252, 257, *Griffin* v. *Illinois,* 351 U.S. 12, 17-18, and *Douglas*

v. *California*, 372 U.S. 353, were all decided upon one aspect or another of the proposition that, where a procedure for the taking of an appeal had been established, it constituted a denial of due process to make the actual prosecution of such an appeal, dependent upon the financial status of the appellant, who, in each of the three instances, lacked money to pay for the production of a required transcript or to engage counsel. In *Hovey* v. *Elliott*, 167 U.S. 409, it was held to be a denial of due process where the *trial* court had stricken the answer of a defendant and refused to receive evidence on his behalf on the theory that he stood in contempt of court. *Allen* v. *Georgia*, 166 U.S. 138, and *Eisler* v. *U.S.*, 338 U.S. 189, dealt with instances in which an appealing defendant had either escaped from custody pending appeal, or had left the country and was no longer amenable to the jurisdiction. In the former case, the Supreme Court of Georgia dismissed a pending writ of error; and in the later the cause was stricken from the docket of this court.

The theory of the petitioner amounts in substance to a claim that he is entitled to prosecute an appeal at his leisure, free of any inhibition or limitation in the form of procedural rule, and that when the appellate court no longer agrees that he has exercised due diligence, he may raise the shield of due process and equal protection of the laws. The theory is as disingenuous as it is novel; and if it is to be resorted to, it should have been supported by authorities, as we believe we have shown it was not. Between the entry on September 22, 1966, of the decree appealed from and the dismissal of the appeals concerned, more than a year had elapsed; the case stood still unbriefed on either side; and the Appellate Court of Illinois may well have been justified in concluding that the appellee (respondent here) was being denied the benefit either of

finality of her decree or expeditious prosecution of an appeal therefrom. In the face of the granting to the petitioner here of six motions for an extension of time, it can hardly be said that the Appellate Court of Illinois acted precipitately or that the petitioner was not afforded every reasonable opportunity to put his legal house in order before it.

## CONCLUSION

We submit that under the prior decisions of this court, the discretion of the Appellate Court of Illinois in dismissing the petitioner's appeals afforded him no grounds for complaint of denial of due process or of equal protection of the law, that the discretion of that court was soundly and judiciously exercised, and that that court should not be disturbed in its exercise of that discretion.

We accordingly submit thaat the petition for a writ of certiorari should be denied.

Respectfully submitted,

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